THE CASE

OF

The Dutcheſs of *Albemarle* and *Chriſtopher Monke*, Eſquire } Appellants.

AGAINST

The Earl of *Bath*, and others, Reſpondents.

BEFORE we come to the Caſe on the laſt Duke's Will, it will be neceſſary firſt to take Notice, how the Eſtate ſtood ſettled by Duke *George*, who made his Will, Dated the 8*th* of *June* 1665, and thereby gave his Eſtate to his Son *Chriſtopher* late Duke of *Albemarle*, and his Heirs for ever. He alſo made a Deed, dated 21 of *Dec.* 1669, whereby in Conſideration of his Son's Marriage, and of 20000 *l.* Portion, he conveyed all the Eſtate to the Duke of *Newcaſtle*, and other Truſtees, to the intent to raiſe a preſent maintenance of 3000 *l.* a Year for his Son, and 2000 *l.* a Year Joynture for the Dutcheſs, and ſubject to thoſe Charges to himſelf for Life, and then to his Son for Life, and then to his Sons in Tail-Male; and then to his own right Heirs.

Duke *George*'s Settlement in 1669, and Will in 1665.

The late Duke *Chriſtopher*, by Will dated the 23*d.* of *Aug.* 1675, being alſo ſeized of other Eſtates of his own Purchace, Deviſed *New-Hall* and a conſiderable other Eſtate, to the Dutcheſs for Life; as alſo, that ſhe ſhould have her Rent charge of 2000 *l. per annum* ſettled on her in Marriage, and 4000 *l. per annum* more during her Widowhood; and declares that in all he intendeth her 8000 *l.*

Will of 23*d.* *Aug.* 1675.

per annum. And afterwards Deviſeth his Debts to be paid; and conſiderable Legacies to his Friends, and a conſiderable part of the Eſtate to the Earl of *Bath* and his Heirs, ſubject to his Debts and Legacies: Which will is produced by the Earle of *Bath.*

Will of 4th July 1687.

The Duke intending to go to *Jamaica*, and to make a New Will, and the Earl of *Bath* having the Duke's Will in his Cuſtody, the Duke in 1686 ſent to the Earl of *Bath* for his Will, for ſo it is proved by Mr. *Crofts*, the Earl's Witneſs, that he going into *Cornwall*, the Duke deſired him to ſpeak to the Earl for it, and the Earl by his Anſwer confeſſeth that Sir *Tho. Stringer*, about the ſame time writ to him for it, and confeſſeth by his Anſwer, That when he came to Town, he carried it, and delivered it to his Grace: whereupon he ſaid by his Anſwer, That the Duke thanked him for Truſting him, and took it from him, and told him he would give him a better thing in Lieu thereof; *but does not pretend to any Witneſs to prove the Duke ſaid or did ſo.*

Contents of the laſt Will.

The Duke did moſt ſolemnly & deliberately make and publiſh his laſt Will, bearing date the 4*th* of *July* 1687, whereby he makes ſeveral honourable diſpoſitions of his Eſtate, and gives the Dutcheſs about 8000*l. per annum* for her Life; appoints a Tomb for his Father, Mother and himſelf to be erected, not exceeding 000*l.* And purſuant to the Intentions of his Mother, appoints his Executors to lay out 1500*l.* for the building of an Almes-Houſe for 20 poor Widows, and 4000*l.* for the Endowment thereof; Deviſeth ſeveral Legacies to his Friends, and gives to Sir *Walter Clarges* a conſiderable Eſtate at *Waltham-Croſs* and elſewhere, of the value of 1500*l. per annum*, after the death of the Dutcheſs, and gives alſo Eſtates to his Couſin Mrs. *Farewell*, and Mrs. *Rawlinſon*, and their Iſſue. Gives his Eſtate in *Ireland* to his Couſin *Henry Monke*, who lives in *Ireland*, and his Sons in Tail Male, with remainder to his Couſin Colonel *Tho. Monke* in *Holland* in Tail Male, remainder to his right Heirs. He Deviſeth to *Bevile Greenevill*, Son to the Earl of *Bath*, his Eſtate in *Surry*, and in ſome other parts, which is of the value of 30000*l.* to him, and his Sons in Tail Male, with remainder to his ſaid Couſin *Monke* in *Holland*, and his Sons in Tail with remainder to *Monke* in *Ireland*: he provides well for his Debts, and all the reſt and reſidue of his Eſtate, and remainders thereof he Deviſeth to his ſaid Couſin, Col. *Thomas Monke* in *Holland* for Life, with remainder to his Sons in Tail-Male, with remainder to *Monke* in *Ireland*, and his Sons in Tail-Male; and adds a Clauſe in theſe Words: *And if it ſhall happen that my Couſin Col.* Thomas Monke, *or any the Heirs Male of his Body ſhall live to come to be in poſſeſſion of the Mannors, Lands and Tenements to him Deviſed, I deſire that they Live at* Potheridge *in* Devonſhire, *the Antient Seat of the Family of the* Monks; *and I do moſt humbly deſire his Majeſty to grant to the ſaid* Thomas Monke, *and the Heirs Male of his Body, the Title of Baron* Monke *of* Potheridge, *ſo that the Name of* Monke, *may by his Majeſty's Grace and Goodneſs, ever remain together with my Eſtate, in the name and Poſterity of the* Monkes, *in memory of my Dear Father and my ſelf; and in remembrance of the Service my Father had*

had the Honor to render unto the Crown, in the happy Reſtauration of the late King Charles *the Second.*

It cannot be denyed but this Will is without all doubt a Revocation of the former Will, of *Auguſt* 1675, and being publiſhed in *England* before the Duke's going to *Jamaica*, in ſuch ſolemn manner as hereafter is ſetforth, and republiſhed in *Jamaica*, juſt before the Duke's Death.

Tthe Dutcheſs on her arrival in *England*, was ſaluted with he news of two Deeds, ſet up by the Earl of *Bath*, of Leaſe and Releaſe, ſaid to be executed by the Duke, and bear now date the 15*th* and 16*th* of *July* 1681, whereby the Will of 1675 is recited, and ſeveral of the Legacies thereby Deviſed, and that he did not intend to alter the ſame, *But to Coroborate and Confirm it, and to ſecure his Debts and Legacies Deviſed by that Will:* It alſo limits *New-Hall*, *Clitherow*, and conſiderable other Eſtates to the uſe of the Dutcheſs for Life, and *Sutton* upon *Darwent*, and other Eſtates, to the value of 900 *l. per annum*, in poſſeſſion to Sir *Walter Clarges* and his Sons in Tail-Male, with remainder to Sir *Tho. Clarges* and his Heirs. *Migdham* and *Tile Mills*, between Mrs. *Farewell* and Mrs. *Rawlinſon*, with ſome other limitation, and limits all the reſt and reſidue of his Eſtate, and the remainder thereof to the uſe of the Earl of *Bath* and his Heirs on Truſt to pay his Debts and his Legacies in his ſaid Will of 1675 mentioned, with and under *a power of Revocation, that he might Revoke and alter the ſaid Deed by any other Deed or Writing, in the preſence of Six Witneſſes, whereof Three of them to be Peers of this Realm*, and upon tender of 6 *d.* and then Covenants, that he will not revoke or alter the Will of 1675, or the Legacies therein, but in preſence of ſix ſuch Witneſſes as are therein before deſcribed, according to the literal Sence and true meaning thereof,

Deeds of Leaſe and Releaſe, 15 and 16 of *July* 1681.

By this Deed, the Earl of *Bath* would avoid the laſt Will of 1687, which he pretends by his Anſwer was never really intended by the Duke to be the ſettlement of his Eſtate, but that the ſame was done by him only at the importunity of the Dutcheſs, to pleaſe her, for that the Duke intended it ſhould ſignifie nothing, for by his Anſwer, his Lordſhip is pleaſed to ſay that at the time when this Will of 1687 was preparing, and when it was made, the Duke had the Deed in his cuſtody, and freſh in his memory; and that in a few days after the Duke had taken from him the Will of 1675, he gave him the draught of the Deed, and deſired him to conſider with Counſel, whether if he made a Will, it ſhould prejudice the Deed, for that he intended not to alter the ſame. And ſays that thereupon he did adviſe with Counſel, and afterwards acquainted the Duke that he was adviſed, that a Will would not prejudice the Deed; at which he ſays his Grace ſeemed well pleaſed, and afterwards with the leſs regret, gave way to the laſt Will, and after the publication thereof, in a few days before his going to *Jamaica*, ſays, that the Duke in his Bed-Chamber, at *Newcaſtle-Houſe*, delivered to the Earl, the Deed and Will of 1675, ſealed up in a Cover,

Cover, desiring him to keep the same, and knows not any body was present, unless some body might be behind the Bed unknown to him, and says, the same was not opened untill after the Duke's Death.

But here note that the Earl does not pretend to any Witnesses to prove a word of all this account of the Deed, or that ever the Duke had the Deed, or ever mentioned it from the time of its execution. Indeed his Counsel Mr. *Courtney* says, That the Earl of *Bath* under great injunctions of secrecie, advised with him upon the question whether a Will would be a Revocation of the Deed? and that he gave him his opinion thereof, That it would not; but does not pretend that he ever spoke to the Duke concerning it: and since the Earl by his answer has put it, we will joyn with him upon that Issue, and put the whole Cause upon it to the judgment of the Lords, *Whether the Duke did truly and really intend this last Will, to be the settlement of his Estate or not? or that he had the Deed at that time before him, and afterwards gave it to the Earl as aforesaid, a few daies before his going to* Jamaica? for so the Court of *Chancery* have now taken it, and that the Duke's Honour cannot be saved therein.

The 4 Points in the Case.

Towards the clearing of these questions, as also to shew for divers Reasons, supposing the Deed to be a Deed, (which *pro hac vice* we will suppose) Yet that it ought to be set aside as surreptitious and unduely obtained, tho' it had no power of Revocation: Or, 2*ly*, as unduely kept and concealed from the Duke: Or, 3*ly*, as a Trust for the *Duke* himself, tho it had no power of Revocation, upon which trust the last Will ought to have its full operation. And 4*ly*, That this having such power of Revocation, tho' it had been duly obtained, yet the last Will ought in equity to be construed a Revocation thereof under these circumstances, tho' the Letter of the Power be not in strictness pursued; and of all these in order. It will therefore be necessary first to shew the evidence of the last Will of the 4*th* of *July* 1687. and the solemnity thereof.

Proofs of the Will in 1687.

First, Sir *Robert Clayton* swears, that the Duke about *Dec.* 1686. told him his intention, how he would make a Will before he went to *Jamaica*, and told him how particularly he intended to dispose the bulk of his Estate to his Cozen Collonel *Monke* in *Holland*, and other particulars of this Will, and consulted him to know who was proper to draw it; and says, he advised him to Mr *Pollexfen*, who was also his Counsel in other matters, and was the late Chief Justice, and that by the Duke's directions he brought Chief Justice *Pollexfen* to him about it, and then the said Chief Justice *Pollexfen* swears that Sir *Robert Clayton* as he thinks, carried him, and that he was often with the Duke about it, and received instructions from his own mouth concerning it, and that sometimes Sir *Tho. Stringer* was also there present at their discourses, and that pursuant to the Duke's instructions, he drew the draught and carried it to the Duke; which being all by him read to the Duke, and corrected and amended as the Duke directed, the Duke desired him to get his Clerk to write it over fair, which he did; and afterwards carried the same to the Duke, and left

left the ſame with the Duke with a blank for the Executors, and that the Duke deſired him to be one of his Executors, and that one of the three parts of the Will now produced, is the ſame he left with the Duke, of his Clerk's Hand-writing, and that ſome of the Interlineations are his own Hand-writing, being amendments on the reading it over; and ſwears, when he was with the *Duke*, it was generally in a morning, and that the *Duke* was very ſenſible, and in a fit condition to make a Will, and that he never in his life ſaw any man more deliberate or ſincere in his Intentions, than the Duke was to have his Eſtate ſo ſetled, and go according to this Will; and knows nothing of any Importunities. And then both he and Sir *Robert Clayton* ſwear, That not only on this, but on occaſion of the Sale of *Dalby* and *Broughton* to Lord *Jefferies*, they enquired what Deed or Settlement the Duke had made, and were told, there was none. And Sir *Henry Pollexfen* ſays, That if he had heard of any ſuch, he would have taken effectual care to have revoked it; and that he had a former Will before him when he drew the laſt. And Sir *Robert Clayton* ſays, He heard the ſaid Duke ſpeak to *Stringer* to ſend to the Earl for his Will. So much was precedent. Beſides that, Sir *Henry Bellaſis* ſwears, That on occaſion of the Duke's giving his preſent Majeſty, when Prince of *Orange*, a great Treat at *Newhall*, the Duke told him, he expected no Return, but his Kindneſs to his Couſin *Monk*; and, that he himſelf intended to provide well for him and his Son.

Publication of the Will of 1687. in *England*.

Now, for the time and manner of Publication, it was thus: At Sir *Robert Clayton*'s Houſe, juſt after the *Duke* had executed the Deeds of Sale of *Dalby* and *Broughton* to Lord *Jefferies*, he withdrew into an inner Room, when Lord *Jefferies* went away; and though the *Duke* did not acquaint Sir *Rob. Clayton* thereof, from whence the Earl draws an Objection, That it muſt be a Clandeſtine Will, got by Importunity, becauſe it was done at Sir *Robert Clayton*'s, and he not a Witneſs; and that the Witneſſes came there, the Earl knows not how. Yet the reaſon thereof moſt plainly appears by Sir *Robert Clayton*'s Depoſition, That though he was privy to the firſt Inſtructions and Directions about it, yet the *Duke* did not call him to be a Witneſs, becauſe in the interim of time, while it was drawing, the *Duke* had taken a Prejudice againſt him, for that the *Duke* believed he could prevail with Lord *Jefferies* to releaſe him of his Articles about *Dalby* and *Broughton*: And he had not ſuch power with Lord *Jefferies* as the *Duke* conceived: Which Sir *Robert* gives for the reaſon why the *Duke* did not call him to be a Witneſs, but ſays, He was not a Stranger thereto, for that Sir *Tho. Stringer* told him what they were going to do, and deſired him to go to be a Witneſs, but he was nice, and on the ſaid account declined

going with them, unleſs the *Duke* himſelf would ſpeak to him. And Sir *Robert* further ſays, That the Earl of *Bath* appointed to come and witneſs the Deeds to Lord *Jefferies*: but coming a little too late, he told the *Earl*, That the *Duke* was perfecting his Will in the next Room: And there they walked till it was done. And gives particular Inſtances why the *Duke* was then of very good Underſtanding; and that he got the better of Lord *Jefferies*, in the Debate about 1000 Guineas, inſtead of 1000 *l.* of the Money to be paid.

Witneſſes to the Will of 1687.

It came to be done at Sir *Robert Clayton*'s, as is proved, becauſe Sir *Tho. Stringer* was the next morning to go the Circuit, and there was no other time left. It was perfected in the preſence of *Anthony Parker* Eſq; the *Duke*'s Steward of *Clitherowe*, who ſays, That going to receive the *Duke*'s Commands into the Country, he deſired him to follow him to Sir *Robert Clayton*'s, and there deſired him to attend as a Witneſs. *Thomas Stringer*, Son of Sir *Thomas Stringer*, whom the *Duke* alſo deſired, and Mr. *Parker* and he ſay, That whilſt the *Duke* was doing the ſame, the *Earl* ſent a Meſſage to him of his being without, and the *Duke* ſent word, he would go to him, but ſtay'd till he had finiſh'd all he had to do. And the third Witneſs was Mr. *Crofts*, and Sir *Tho. Stringer* was alſo preſent, but did not ſubſcribe as a Witneſs with the others, becauſe he was named one of the Executors.

Three parts of the Will of 1687. and how diſpoſed by the Duke.

There were of this Will three ſeveral parts, all of them in words the ſame, one of them in the hand-writing of Sir *Henry Pollexfen*'s Clerk, the other two in the hand of Sir *Tho. Stringer*'s Clerk; every one of the three parts were 19 ſheets of Paper; and the *Duke* did not only himſelf put his Hand and Seal to every one of the 19 ſheets of each part, but alſo cauſed all the Witneſſes to ſubſcribe their Names to every one of the ſheets, and then had each of the three parts ſealed up in diſtinct Covers, under his own Seal, and carried the ſame home, and locked the ſame up in his Cabinet, and endorſed on the back of each of them, with his own Hand, theſe words, *My Laſt Will, 4th. July*; and there they reſted for ſome time, till he came near going away, and then he ſhewed them to Mr. *Bowes*, who was another of his Counſel, and told him how he intended to give one of them to the Lady *Eliz. Pierpoint*, to be given to the Dutcheſs of *Newcaſtle*; and the other to carry with him to *Jamaica*; and told the ſame alſo to Dr. *Sloane*, on his preſſing him for his Health ſake to leave the Town, and thereupon told him, he was going to Lady *Eliz. Pierpoint*, and ſhewed him one of the Wills in his Pocket, and that he had no more to do in Town, but leave that, or to that purpoſe. As alſo Dr. *Barwick* ſwears, That the *Duke*, after he had made the Will, told him, That he had made his Will, and named him one of his Executors and Truſtees; and that he never heard any thing of it till then.

then. Which plainly falſifies what Mr. *Croſts* has pretended, That Dr. *Barwick* uſed Means to perſwade the *Duke* to it. And Lady *Eliz. Pierpoint* ſwears, That the *Duke*, the day before he went, left with her one of the Parts, which he declared to be his Will, and deſired her to take great care that the ſame be delivered to the Dutcheſs of *Newcaſtle*; which was accordingly done: And Mrs. *Monk* proves the other Part delivered to her Husband Col. *Tho. Monk*: And the *Duke's* Letters, and other Evidences, prove, That the *Duke* at that time ſent for Col. *Monk*, into *Holland*, to come to him before he went to *Jamaica*; and writ to the Prince, to have his Leave for him to come; and when he came, gave him 300 *l.* to bear his expences, and uſed to ſet his Son *Chriſtopher*, the now Plaintiff, next to himſelf at Table, and entertained the Colonel's Wife and Family with the greateſt Kindneſs imaginable, with Lodging and other Entertainment in his own Houſe. The third Part of the Will he carried with him to *Jamaica*, and kept in his ſtrong Box with his choiceſt Papers; and in his laſt Sickneſs, at a time when he was better, he opened the Box, and having given Dr. *Sloane* ſome Letters of the late King *Charles* the Second, Duke of *York*, and Duke of *Glouceſter* to read, he took alſo out of the Box his ſaid Will, and declared it was his Will; and *Dr. Sloane* not minding him (becauſe he was reading the Letters) he called to him, ſaying, *Doctor, This is my Will*, and put the ſame up again in the preſence of Dr. *Sloane*, Mr. *Rainey*, and Mr. *Fountain*, two of his Gentlemen, and deſired, That if he ſhould relapſe and dye, the Key of the Box might be delivered to his Wife. This, 'tis pretended on the other ſide, was not a Re-publication, becauſe it was not formal; and ſo it has been ſaid by the Court; but the Anſwer is plain, That this was a declaration of it to be his Will, which is the ſubſtance of a Publication; and the more accidental it was, the more it ſhews the ſincerity thereof, and that he was not under any importunities to do it. And, that the ſaid Will was not clandeſtine or ſecret, appears further by this; That Sir *Tho. Clargis* by his Anſwer confeſſeth, That he had a Copy of it before it was perfected, (as is ſuppoſed from Sir *Tho. Stringer*) and that he made uſe of that Copy; for Sir *Henry Pollexfen* ſwears he came to him about it, and would have perſwaded him to diſcourſe the matter of the Deviſe to his Son, for to that purpoſe; but he utterly declined diſcourſing with Sir *Tho. Clargis* thereon. And Sir *Walter Clargis* confeſſeth, he had ſome notice thereof, and did go to the *Duke*, and with Modeſty expreſſed his ſenſe of the ſame to the *Duke*, That a Remainder after the *Dutcheſs's* Life, was not of that conſequence to him: But the *Duke* was not prevail'd upon to alter the ſame.

Re-publication in *Jamaica*.

The

The aforesaid matters, some of them precedent to the Will, some of them concomitant, and some of them subsequent, are conceived to be as full and as clear and undeniable proofs of the Will, and of the Duke's real intentions thereby, that the same should be the compleat Settlement of his Estate, as ever can be of any thing.

The Deed of 1681.

But now the Deed which is to set aside and avoid this Will, is further to be considered; and there are not only strange inconsistence in the account that is given thereof, but also in the substances of the Deed it self; not that from this or any thing else we will now enter upon the question, whether the said Duke Sealed the Deed or not: for then should we offer the Evidence of my Lord *Cheyney*, Mr. *Butler*, Mr. *Cheyney*, Mr. *Bowes*, and Dr. *Barwick*, who all of them swear that when they were first produced, the Lease was dated in 1681, and the Release in 1682. which being extraordinary, made them remark it, and Mr. *Butler*, and Mr. *Bowes* with much adoe, after notice taken thereof, got leave to read it, and found it to be 1682. and there appeares now a plain Rasure made in the Figure of 1 as also of the Year of the King in the date of the Deed: and note if it had been 1682, as the said five Witnesses say it was, it had not only been void at Law, because the Lease was determined; but Sir *William Jones* also was dead in *July* 1682; but alive in 1681. It is true, Mr. *Crofts*, now the Earls agent, says that though he there first read it 1682, yet when it was questioned, he shewed it to them all round, and they were all then satisfied, that it was 1681, which is positively contradicted by these five Gentlemen, who all of them swear they went away, believing it to be 1682. And therefore Mr. *Bowes*, and Mr. *Cheyney*, by Lord *Cheyney*'s direction, took notice of it in writing, and now produce them: Nay, Mr. *Crofts* has confounded himself in this matter, by a Letter he writ the next day to Mr. *Bowes*, that he had gone to the Earl's again, to see the Deed, and assured him that it was 1681; which he needed not have done, if they had been all satisfied before, neither will we enter upon the evidence of the Seal-Cutter Mr. *East*, who swears he cut the very Seal of the Duke's Arms upon the Deed, for the Earl of *Bath*, and that he paid him 3 *l.* 10 *s.* for it, with a little Seal of his own Arms; and produces the Impression of both of them, kept by him. Nor will we now consider of the eight witnesses, who by comparison of hands Swear they do not believe it to be Sir *William Jones*'s hand on the back of the Deed, nor those who disprove the Duke's hand, and Sir *John Coppleſtons* hand; for all those matters they will say were offered before a Jury, and a Verdict for the Deed: And we will for this time suppose it to be a Deed, with this, that the finding of it to be a Deed, was no more than finding that the Duke did

Five Witnesses to the Deed of 1682.

The Rasure.

Sir *Will. Joues* Dead in *July* 82.

The Seal.

Against the hands of Sir *Will. Jones* Sir *Jo. Coppleſtons* and the Duke.

did Seal and deliver it: But what the Law or Equity was upon the Deed, was never ſo much as once mentioned at the Tryal. But the Operation thereof in Equity remained in the ſame plight as before the Tryal, ſave only that whereas the Court before doubted whether it was a *Deed*, and therefore directed it to be tryed: They were now to look upon it as a *Deed*, but were not to look upon it the more ſo, becauſe we have not moved for a new Tryal; for that we had ſo done if we had not been fully poſſeſſed, that there were ſufficient grounds of Equity to be relieved againſt it.

We will therefore proceed to the further account given of the ſame by the Earl of *Bath*, in his Anſwer, he ſays the Draught was Originally prepared by Sir *Tho. Stringer*, and is in his Sons hand writing, and interlined by himſelf; but after he had ſo drawn the Draught, the *Duke* would not truſt Sir *Tho. Stringer* with the knowledge of the further proceedings of it, leſt he ſhould diſcover it to the Dutcheſs; and the ſaid Earl confeſſeth that therefore Sir *Tho. Stringer* might ſay, That he knew nothing of the Execution of the *Deed*, for that he did not; but he ſays it was committed to the Care and Conduct of Sir *Will. Jones*, who had the peruſal of the Draught from the *Duke*, and as is ſaid, [writ theſe words in the Margent of the Draught, [*viz.*] *I approve this Proviſo*, Will. Jones) but it is not pretended that there is one other word writ in the Draught by Sir *Will. Jones*, nor any the leaſt Alterations by him. And the Earl, by his Anſwer further ſays, he knows not who Ingroſſed it, but it was all committed to the Care and Conduct of Sir *Will. Jones*, who he ſays was at *Albemarle-Houſe* to witneſs it.

Earl by his anſwer, ſays, Sir *Tho. Stringer* was not to be truſted with the knowledge of the Deed, & all was committed to the care and conduct of Sir *Will. Jones*.

And that the Earl knew not who Ingroſſed it.

We ſhall preſently ſee how this account given by the Earl in his Anſwer will agree with the Evidence in the Cauſe; and what Care and Conduct a man of Sir *Will. Jones*'s great Learning and Integrity had of this poor Deed, to let it paſs his hand without the leaſt of his Remarks or Amendments; For tho there are many other Arguments of Fraud and Surpriſe againſt it, yet there can be none ſurer and ſtronger than what appears upon the very face of the Deed it ſelf, and for that purpoſe we will view it now all over, and by the way will allow that every over-ſight or miſtake in a Deed ſhall not be an Argument of Fraude, where other things and Circumſtances ſtand fair, but where it is nothing but miſtake and deluſion, from the beginning to the end, and under ſuch other circumſtances as attend this Caſe, there it is graet concurring Evidence of Surprize.

Surprize and Miſtakes appear all over the Deed.

Firſt, It recites ſome parts of the Will of 1675, and plainly miſtakes in the Recital of other parts of it, and then it labours to make a Conſideration in Phraſes, very unuſual to Sir *William Jones*, or any other Lawyer, as well as unbecoming their skill: for it goes thus: *And whereas it may be thought ſtrange, That the ſad Duke by his ſaid laſt Will and Teſtament, which*

by theſe preſents the ſaid Duke doth confirm, and doth not intend to revoke that the ſaid Duke ſhould give his Eſtate from his Heirs at Law. Therefore for the ſatisfaction of the world therein, the ſaid Duke hath declared, and by theſe Preſents doth declare, that he hath taken into his ſerious Conſideration, that a conſiderable part of his Eſtate was given from the Crown; and the Duke is ſenſible of the great Honours and Favours that his Majeſty did beſtow upon his late Father, both in his life time and after his deceaſe; and the great Grace and Favour which his Majeſty ever ſince the ſaid late Duke's death hath beſtowed, and continually doth beſtow upon the ſaid Duke, which the ſaid Duke doth with all humility acknowledge: And whereas it is the unhappineſs of the ſaid Duke, that She who is the right Heir at Law to him by Deſcent, was Married to the Son of one of them that had a hand in that horrid Murther of that Bleſſed Martyr King Charles *the Firſt of bleſſed Memory, and therefore the ſaid Duke cannot out of his Duty to God Almighty, or to his Majeſty, permit the Children of any perſon deſcended of any Regicide to enjoy any part of his, or his late Father's Eſtate, either paternal, or granted by his late Majeſty, or otherwiſe. Now this Indenture witneſſeth that for the preventing of ſo Ingrateful and Diſhonourable a Deſcent, and for the Conveying, Settling and Aſſuring of the ſeveral Honours, Mannors, Lands, &c. of the ſaid Duke upon a perſon of Honour, and the moſt Deſerving of the Kindred, Family and Blood of the ſaid* George *late Duke of* Albemarle, *Father of the ſaid Duke: And for Corroborating and Confirming of the Will aforeſaid, made by the ſaid Duke, and for the ſecuring the ſeveral Legacies to the ſeveral perſons therein deviſed: And to the end that no pretended laſt Will or Teſtament ſhould be ſet up by any perſon whatſoever, and for preventing any of Claim or Pretence to any of the ſaid Honours, Mannors, Lands, Tenements, or Herditaments, by the right Heirs at Law of the ſaid Duke by deſcent, or by any pretended or counterfeited Will that poſſibly might be ſet up by them, or any other perſon after the ſaid Duke's Deceaſe, there being too many ſuch practices in this latter Age. The ſaid Duke, for the Conſideration aforeſaid, and for the natural Love and Affection which he beareth unto the Right Honorable* John *Earl of* Bath, *his moſt dear and near Kinſman of his Father's ſide, and of the many good Offices which the ſaid Earl of* Bath *hath continually done, both to the ſaid late Duke in his Life, and to the ſaid Duke ſince his death. And for the natural Love and Affection which he beareth to Sir* Walter Clarges *Barr. his next Kinſman on his Mothers ſide; and to his near Kinſwomen Mrs.* Mary Farewell, *and Mrs.* Elizabeth Rawliſon, *and for divers other good Cauſes him thereto moveing, he the ſaid Duke doth* Grant, Bargain, Sell, Releaſe and Confirm to the Truſtees and their Heirs (*names no Lands in the granting part*) but in general thus: *All the ſaid Duke's Honours, Mannors, Lordſhips, Offices, Lands, Tenements, and Hereditaments*

ments

ments of the ſaid Duke of Albemarle,(and tells not which of the Dukes) in the Kingdoms of *England*, or *Ireland*, and *Carolina*, and elſe where, in any other Nation or Country. To the Uſe and Purpoſes herein after intended, and ſo declares the Uſes of the ſeveral Mannors and Lands, as was firſt herein before ſet forth.

Some obſervations on the frame of the Deed.

Now we do Appeal them to ſhew that ever any Lawyer paſſed ſuch Stuff and Nonſence in the Conſideration of a Deed, as to be thereby proclaiming his reaſons to the world about Regicides, and Martyrdoms; as alſo about the moſt worthy and deſerving of his Father's ſide, and of his Mothers ſide. To ſay it is to prevent a counterfeited Will, a practice too much in the late Age: That muſt be a forged Will, and is always prevented by the Law. To ſay it is to prevent the Deſcent to the Heir of the Regicide, which had been every jot as well prevented by the Will of 1675, or any other Will. To ſay that it is to prevent ſuch counterfeit Will as might be ſet up by the Heir at Law (who is ſo far from needing to ſet up a Counterfeit Will, that he needs not to ſet up a good Will, his Title being beſt by deſcent. But alas! it is yet worſe than all this, for it ſays *it is to Corroborate, and not to Revoke the Will of* 1675, and to ſecure the Legacies which is an Impoſsibility in Law, for if the Eſtate paſs by the Deed, the Grantee muſt Claim by the Deed, and not by the Will, but tho in that caſe there were no uſe declared by the Deed; but if the ſame were in general to the uſe of the Will: the Will tho thereby revoked at Law; yet might remain a writing to declare the uſe of the Deed. And ſo was the Caſe in *Dyer*. But here it is impoſsible to be ſo conſtrued, or that the Will of 1675, can remain of any validity at all, for that the Deed does declare the uſe of all the Lands, and there are not the limitations of any one of the Mannors, or Lands of the whole Eſtate, the ſame by the Deed, as they are by the Will: but every one of them in one reſpect or other differently limited, as appears by a particular Paper extracted thereout, except only that the Mannors of *Midgham* and *Tyle Mills* are limited by the Will of 1675, to Mrs. *Rawlinſon*, and Mrs. *Farewell*, with remainder to their Sons, and are the ſame way by the Deed, but then note that this Deviſe of *Midgham* and *Tile Mills* is on the Margent of the Will, and every word of it in the Earl of *Bath*'s hand, as is proved by Sir *William Lewſon Gower* deceaſed: And then to ſay, as the Deed does, that *New-Hall* is in part of Dower, and other Lands in further part of Dower, and o-other Lands in full of Dower to the Dutcheſs, are not like Sir *Will. Jones*'s for the Duke might make a Joynture in barr of Dower, or ſettle Lands in part or full of a Joynture, but could not ſettle her a Dower.

Theſe

The Opinion of the Court, about Sir *W. Jones.*

Theſe things appeared ſo plain in the Court of *Chancery*, that the Judges declared, that they did not believe that ever Sir *Will. Jones* peruſed the draught, or was conſulted on the whole; but only upon the proviſo: which is not only very unuſual, and improbable in a thing of that conſequence, but alſo is an argument for the Earl of *Bath*, directly contrary to the Earl of *Bath*'s Anſwer: Who ſays, The care and conduct of all was committed to Sir *W. Jones*, and believes he read it to the *Duke*, before it was brought to be executed, and that the *Duke* was often with him about it.

Further Evidence of Surprize.

The next Surprize appearing upon the face of the Deed, is, That all the Eſtate in *Eſſex*, *Lancaſhire*, and *Yorkshire*, though by the Will of 1675. they would have gone to the Duke's Daughters, before the Earl or his Sons or Daughters; yet by the Limitations of the Deed, not only the Earl, and his Sons, but alſo his Daughters would carry theſe Eſtates of great value, from the Duke's Daughters; which no man can think the Duke would have done, if he had underſtood what it was.

The Eſtate would go by the Deed from the Duke's Daughters to the Earl's Daughters.

They have pretended to anſwer this, by ſaying, That the *Duke* might intend that towards a ſupport of the *Dukedom*, which he expected the *Earl* would have, and the Court alſo took this for a good anſwer; but that is no anſwer. For firſt, how is the Will of 1675. then corroborated, which gave it all to the Duke's Daughters? and what tho' the Earl had been to be Duke? he had a plentiful Eſtate ſufficient without it; but next, what is that to the *Earl*'s Daughters taking it from the *Duke*'s Daughters? for the Dukedome was not to go to the *Earl*'s Daughters.

Further Evidence of ſurpriſe.

Another ſurprize appearing on the Face of the Deed, is, that whereas the *Earl* in his Pleadings, ſays, it is one of the Motives of this Deed, That there was a defect in the *Duke*'s ſettlement on his Marriage, in that he had no power to make proviſion for younger Sons: and therefore this Deed was to make proviſion for ſuch younger Sons: and therefore it limits his Lands at *Redriff* and *Norton Diſney*, for a Second and Third Son; but it appears, thoſe Lands were all by his Marryage ſettlement in 1669 ſetled to the uſe of his eldeſt Son, and could not be ſo ſetled by this Deed.

Duke's younger Sons could not be provided for by the Deed.

They do not anſwer this by what they have ſaid, That *Dalby*, *Broughton*, and *Bitchfield*, were alſo ſetled by the Deed for ſecond and third Sons: for tho' they were ſo, yet they were afterwards ſold, and it was after the Sale of them, that the *Duke*, as the *Earl* ſays, gave him the Deed, intending, as he ſays, it ſhould ſtand. So then here was a Deed to make proviſion for younger Sons, and none of them could have a Foot by it.

The next ſurprize appearing upon the Deed, is the limiting *Sutton* upon *Darwent*, &c. a very conſiderable Eſtate, for want of

of Iſſue Male of Sir *Walter Clargis*, to Sir *Tho. Clargis*, and his Heirs; againſt whom the *Duke* had at that time conceived great diſpleaſure, and continued under it: And it is not like that he ſhould limit ſuch Eſtate to a Man whom he would not ſee, as is proved in the Cauſe; Nor was there any thing given to Sir *Tho.* by the Will of 1675.

Then there is no power given to the *Duke*, or any body elſe by the Deed to make Leaſes.

No power by the Deed for the *Duke* to make Leaſes.

Then the ſtrange manner of the Power, that it ſeems ſo particular, as if it were contrived that he might not know or remember what it was; or might be incapable to purſue it, that nothing leſs than ſix Witneſſes, and three of them Peers, muſt do, when three credible Witneſſes are as much as by the Act of Frauds and Perjuries or any other the moſt ſolemn Act is neceſſary; and why ſhould the *Duke*, who was the free owner of his Eſtate, have ſo intangled himſelf without any manner of occaſion or conſideration, if he had underſtood what he was doing?

Then comes the Covenant in the Deed, *That the Duke for the further prevention of the miſchief, and inconveniences that might attend any future, ſuddain, or ſurerptitious Will, which may in any way defeat his ſaid recited Will, which he doth hereby declare to have been made on mature conſideration, as aforeſaid; Doth therefore Covenant that he ſhall not Revoke, Annull, or Diſcharge his ſaid Will or any the Legacies thereby deviſed, unleſs by ſome Inſtrument, Sealed, and Executed, in the preſence of ſo many, and ſuch Witneſſes as are in the laſt mentioned Proviſoe, ſpecified and deſcribed for credible Witneſſes, according to the literal ſence and true meaning of the ſaid Duke, expreſſed in the ſaid Proviſoe.* Now the *Duke* muſt certainly be impoſed upon by this; For firſt, it is pretty hard in any Caſe for a Man to abridge himſelf of making, or altering his Will: but next, to make the *Duke* Covenant he would not do it, when by this very Deed he had done it to all intents and purpoſes; as appears by the Reaſons aforeſaid: and ſo the minute he executed the Deed, he broke the Covenant of the Deed, and it cannot now be denyed, but that the Will of 1675. is revoked by the Will of 1687. expreſsly contrary to that Covenant.

The ſtrange Covenant in the Deed.

But if Sir *W. Jones* had not approved the Deed, (as it is ſaid by the Earl he did,) it need not be much wondered what was in the Deed; for the *Duke* was in this ſo much out of his ordinary Road and Care he had of eeds, that inſtead of the general Rule, he had never to execute any Deed, but what was firſt Counter-ſigned by Sir *Tho. Stringer*, or in his abſence by ſome other of his Counſel; as appears by many Witneſſes; and particularly by Mr. *Bowes*, who

 ſays,

ſays, in *Stringer*'s abſence he made him to do it, and told him if there was any thing amiſs in it, he muſt anſwer for it: yet ſo little was there of that care in this Caſe, that the Earl by his Anſwer ſays, That the execution of it was kept as a great ſecret from *Stringer*, and the *Dutcheſs* of *New-Caſtle*, Lord Preſident, Sir *Tho. Stringer*'s two Sons, Mr. *Bowes* and others; all ſwear *Stringer*'s general Declarations about it on all occaſions, that he knew nothing of it, and that he ſaid to ſome of them, he would ſo ſwear.

Erington's Evidence anſwered about the abſtract.

This they would Anſwer, firſt, by Mr. *Erington*, who was *Stringer*'s Clerk, and Swears that in the Duke's life time, and juſt before his going to *Jamaica*, Sir *Tho. Stringer* gave him an abſtract of the Deed to write over fair, which he did; and took from him the fair Copy thereof, and left the other with him, which he now produces; and therefore *Stringer* muſt have the Deed, which in the firſt place flatly contradicts the Earl's Anſwer. Where he ſays it was kept ſo great a ſecret from *Stringer*, and in the next place cannot poſſibly be true if the Earl's Anſwer be ſo: which in another place ſays, that the Deed and draught were kept all along by the Duke, till lately, before his going to *Jamaica*, given to the Earl as aforeſaid, and a ſecret from *Stringer*: Where then was there any time or room left to believe that *Stringer* had the Deeds to make an abſtract thereof in the Duke's life time? Conſidering likewiſe, not only the Declaration of *Stringer* againſt it, but alſo his concurring with the laſt Will of the Duke, and adviſing him in all the ſubſequent acts of his life, contradictory to the Deed: But it is no wonder to ſee an abſtract thereof in *Stringer*'s hand-writing, for ſo have others of the Counſel in their hand-writing's taken ſince the Duke's Death, and ſince the Earl, ſome weeks after producing the Deed, gave a Copy thereof, and the far more like it is to be ſo; becauſe there is likewiſe in it the abſtract of the Leaſe for a year, which never uſes to be abſtracted on any ordinary occaſion: ſo that the evidence of *Erington* appears inconſiſtent with the Earl's Anſwer, not credible, *and yet the Court relyed greatly theron.*

Stringer's Court keeping anſwered.

Neither is all this Anſwer'd by what they ſay, that Sir *Tho. Stringer* kept a Court for the Earl of *Bath* after the Duke's death at *Waltham*, and declared that the Earl had as much right to the Eſtate, as he had to *Durance*: For firſt, that expreſſion was drawn and extorted from him in Complement to the Ladies, who put him upon drinking the Earl's Health at Dinner; and he declared at other times, he kept not the Court for the Earl, but for one Mr. *Diſher*, who hath a Leaſe of the Court for twenty years: But all theſe pretences of *Stringer*'s are yet further refuted by the Earls own Witneſs, Mr. *Shaw*; who ſays that preſently after the firſt

firſt news of the Duke's Death Sir *Tho. Stringer* made him write to Mr. *Monke* in *Ireland*, to tell him that the Duke by his Will of 1687. had left him his Eſtate in *Ireland*; and he ſays he did ſend, and afterwards when the Deeds were produced, *Shaw* being preſent, ſtaid till the reſt of the company were gone, and was angry with *Stringer* for making him write ſuch a ſtory to *Monke* in *Ireland*: to which *Stringer* anſwered, that he knew nothing of it all at that time, and wondered at it, but that it was well witneſſed by Sir *W. Jones*, and he believed now it would ſtand, but that he expected there would be a great Suit in *Chancery* about it: Which ſhows by their own Witneſs, that Sir *Tho. Stringer* knew not of it till after the Duke's death, and then thought it would prove a Suit.

The Evidence of the Draught anſwered.

And for the draught they produce, ſome part in *Stringer*'s Son's hand-writing, and ſome part of it interlined by *Stringer*. Firſt, It is to be noted, that the firſt and the laſt ſheets of the draught, are every word of them the hand-writing of *Thompſon*, the *Earl* of *Bath*'s Scrivener, who ſays, he changed them by the *Earl* of *Bath*'s direction; and writ them over fair, leſt he might miſtake in engroſſing, the *Earl*, as he ſays, being a Perſon very curious in things of this kind: But how came *Thompſon* then not to alter ſeveral others of the Leaves, wherein there are many obliterations and interlineations? and how came *Thompſon* then in the ingroſſing, which was to be done with ſo much care and curioſity, to miſtake, as he now pretends in the firſt line of the Date? for that has been raſed, as appears by looking on it, and yet it is plain without any blott in the draught, and there is not one other word raſed in all the Deed.

It might poſſibly be, that ſome Perſon might make ſome Aplications to Sir *Thomas Stringer*, about the preparing ſome Draught for the Duke, but *when*, or *how*, does not appear: But it doth appear, by the Proofs in the Cauſe, that the Earl a long time had an Eye and a Deſign upon the Duke, for his Eſtate; but it doth appear, that the Duke did not conſtantly deſign it for him: Nor can we tell what Tranſactions there might be in the preparing of a Draught; but there is no Proof, except the Earl himſelf, that ever the Duke ſaw the Draught.

Further circumſtances of Surprize.

The Deed never read to the Duke, nor any Copy or Counter-part.

And the *Earl*'s own Hand is interlined in the Draught; and we do Challenge the Earl to prove, That the Duke ever ſaw the Draught, or directed a Word of it, or ever read the Deed, or that there was ever any counter-part of it; all which concurring, with ſo much other Evidence, are great Badges of Surprize. Nay, the Earl confeſſes, there never was any counter-part; and both he and the ſubſcribing Witneſſes confeſs, they knew not that ever it was read to him: But he ſays, He believes it had been before read

read to him by Sir *William Jones*, who at other times (because of the Nonſence of the thing) the Counſel at the Bar for the Earl have been forced to ſay, was only conſulted upon the Proviſo, and ſo the Court took it as aforeſaid, contrary to the Earl's own Anſwer.

The Second General Head of Conceal-ment and Se-crecy, and the Evidences thereof.

The ſecond and next Head to go upon, is, That though this Deed had been well and duly obtained, yet the ſame hath been ſo ſecreted and unduly concealed from the Duke, that he did not remember or know what it was; as appears by the following Proofs.

1. It was never read, nor any Counter-part or Copy left with him; nor doth any man alive, except the Earl, ſay, that ever they ſaw it after with the Duke, or heard the Duke ſpeak a word of it. And the ſubſcribing Witneſs *Algeman* ſays, That at the executing thereof it was delivered to the Earl; from which there ought to be expected a better Account, where it has been all this time.

2. That it was very ſecret, appears by what the Earl confeſſes, That Sir *Tho. Stringer*, he ſays, drew the Draught, yet muſt not know of the Execution: And we would fain know, ſince *Stringer* was not to be truſted with the knowledge of it, how came he to be continued a Truſtee therein. Nor was it ſingly concealed from him, but alſo from all the reſt of the Truſtees, the Duke of *Newcaſtle*, Sir *Walter Clargis* the Duke's great Friend, and Mr. *Greenvil* the Earl's Brother. And Mr. *Courtney* ſays, That when the Earl diſcourſed with him concerning his Opinion of it in 1686. it was under injunction of great ſecrecy. Nor can there be any good Reaſon aſſigned for ſuch ſecrecy; for, if the ſettlement had been fair, it might have been owned to all the World, and the Dutcheſs had no reaſon to be offended thereat, for it was much the beſt that ever had been made on her before; nay, ſhe had reaſon to be very thankful to the Earl, for he ſays, That he firſt procured the Duke to make his Will of 1675. ſo beneficial for her; and thereafter, That it was by his ſollicitation the Duke, by the Deed, gave her all abſolutely; whereas by the Will there was 4000 *l per annum* only during her Widowhood. Which ſhews a great Friendſhip between him and the Dutcheſs, that he ſhould do her ſuch Kindneſs without her asking, and yet muſt be kept ſuch a Secret from her. And to whoſe benefit ſhould ſhe have oppoſed ſuch Deed, or uſed any Importunities to get the laſt Will, ſince the Earl was ſo much her Friend, and Col. *Monk* upon the matter a Stranger to her? Beſides that, ſuch Proofs as are offered about Importunities of the Dutcheſs, are *greatly diſproved* by other Witneſſes, who prove the Duke and Dutcheſs living always well together; and they relate to other things

Pretence of the Dutcheſſes Importunities anſwered.

things, and done in *Jamaica* after the Will made here. And farther, Mr. *Bowes* ſays, He wiſhed the Duke, by the Will to give her the Plate and Houſhold-Goods abſolutely, inſtead of the uſe of them for Life; and that the Duke refuſed, as alſo to give her the Inheritance of *Grindon*, which was her own Eſtate, which the Duke likewiſe refus'd; and the Duke not having ſuch Opinion of her as is pretended by the Earl, appears further by this, That by a Will of 1673. and the Earl's Will of 1675. and all Wills, he gave her the Guardianſhip of his Children and their Eſtates, if he had any; ſo there was no real occaſion for ſuch extreme Secrecy, and the Pretence of Importunities is anſwer'd.

3. It was ſo ſecreted, that the Duke took upon him afterwards, as before, in all his dealings to be the free Owner of his Eſtate: He ſold *Dalby* and *Broughton* to Lord *Jefferies*; he ſold *Bitchfield* to Sir *Tho. Clargis*, to whom the remainder of it is limited by the Deed; *Wenbury* to Mr. *Pollexfen*, and all theſe with the privity of the Earl, who was concerned in the Treaty, and no notice taken of the Deed, though enquired after; as Sir *Robert Clayton* and Lord Chief-Juſtice *Pollexfen* ſwear.

Duke ſold Eſtates, and alſo made voluntary Grants inconſiſtent with the Deed.

It will not ſerve turn to give here for Anſwer, That this was a voluntary Deed, and would be void againſt a Purchaſer, and therefore there need not notice to be given thereof, for the Earl muſt firſt then himſelf be a good Lawyer, to underſtand the Statutes on that point; and then alſo the Duke muſt be as good a Lawyer as he, or elſe the Duke was deceiving the Purchaſers. Nor is the Law ſo very clear in the Point, but that ſome voluntary Conveyances, fairly and duly obtained, may hold good even againſt a Purchaſer. And Lord Chief-Juſtice *Pollexfen* ſwears, That if he had heard of any ſuch Deed, ſure he is he would have taken effectual Care to have had it revok'd. But this went yet further, for the Duke, from time to time, every year afterwards, made many Leaſes to Tenants without Fines, as alſo ſeveral Grants purely and only voluntary. As for an Inſtance; he granted an Annuity of 100 *l. per annum* to his Natural Son *George Geofferyes*, a Child of two years old: He gave Annuities and Proviſions to ſeveral of his Servants, and all this by the Advice of Sir *Thomas Stringer*, who counterſigns them all, and being as voluntary as the Deed, are all void if ſuch Deed ſhould ſtand, and the Duke muſt have intended to *deceive* them all: And nothing can be a ſtronger Argument of a deſigned Concealment, than not to diſcover a thing when there is a proper occaſion, as here there was, both on the occaſion of the Duke's ſending for the Will of 1675. ſelling the ſaid Eſtates, and making the ſaid voluntary Grants. To this the Court *ſeemed* to give Anſwer, That the *Duke* might *depend*

upon the *Earl*, to make good thoſe voluntary Grants; but the Earl does not pretend, that ever the Duke ſo much as deſired him ſo to do.

Conceal'd from Lord Preſident.

4. It was kept by the Earl as ſo great a Secret, that the Earl in *Octob.* 1681. three months after the Deed, did not own it to my Lord Preſident then his intimate Friend, but on Diſcourſe with him, was conſidering and adviſing what to do with the Duke, or how to get a Deed, and never told him that he got any.

The Account of *Thompſon.*

5. Great Secrecy and Concealment appears by the Story of *Thompſon*, who is now the Earl's Witneſs, and how he diſproves the Earl's Anſwer. The Earl by his Anſwer ſays, That he knows not who engroſſed the Deed, but being of moment and ſecrecy, the ſame was after the diſtruſt of Sir *Tho. Stringer*, wholly left to the Care and Conduct of Sir *W. Jones*. Now, it was ſome time after this Anſwer, that it appearing to be none of Sir *Will. Jones*'s Clerk's Hand-writing, it was found out to be the Hand-writing of Mr. *Thompſon*, the Earl of *Bath*'s Scrivener, for theſe Thirty years paſt, who, when firſt examin'd for the Dutcheſs, gave this account, *That the Deed now produced is his the ſaid* Thompſon's *Hand-writing: That he engroſſed a Deed of the ſame purport at the time of the Welch Camp, which was in* Auguſt 1687. *for the Earl of* Bath, *and at the Earl's Houſe; and, That the Earl and he compared it; and the Earl paid him for it; and he thought it had been ſoon after perfected, but remembers not that ever he engroſſed any but that one in* 1687. Then in ſome time *Thompſon* was produced as a Witneſs for the Earl, and ſwears as formerly, That he engroſſed ſuch a Deed for the Earl, at the time of the *Welch Camp*, and believes, That a Parchment Writing now produced to him by the Earl, and never executed, to be the Parchment he ſo engroſs'd at that time; and, That he engroſſed the Deed in 1681. he believes, about the time of the date, and ſays, he writ the two Sheets of the draught fair, becauſe the Earl was very curious, as aforeſaid; but he knows nothing of Sir *W. Jones*, or the Duke.

Now, from hence it appears, that the Earl's Anſwer and Account of the Deed is plainly diſproved, for *he knew who engroſſed it*, and it was not in the Care and Conduct of Sir *W. Jones*, but in his own; but no man alive can Anſwer the Objections about *Thompſon*, as it is now pretended to be done; for, if they proved any Directions from the Duke, or other Steps of a Deed to be prepared at the time of the *Welch Camp*, in 1687. or, That that had been different in ſubſtance from this Deed, it were ſomething; but inſtead of that, the Inſtrument they produce, which they ſay is the Writing, was prepared at the time of the *Welch Camp*, is the ſame in words with the Deed of 1681.

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and the Power of Revocation is the ſame, only the laſt Covenant is left out. Now we would ask (if it were as they ſay, That the Duke at that time had the Deed of 1687. in his Cuſtody, and intended it to ſtand) what need was there, without the *Duke's* privity, to be making another of the ſame, only to bear date 1687? This they have been often deſired, but never can make any plauſible Anſwer to it, and moſt plainly ſhews how very buſie the *Earl*, and how little buſie the *Duke* was in this great *matter of moment* to his Grace's Family. Some of the Judges went to anſwer this, by ſaying, *That the Earl might in* 1687. *be preparing another Deed, that he might ſtand on a better foot, and without a Power of Revocation.* Which was the greateſt Miſtake imaginable, becauſe the Parchment of 1687. has the ſame Power of Revocation as aforeſaid. But others of the Court in delivering their Opinions on the occaſion of this Story of *Thompſon's*, and ſeveral other things, declared, *They were ſo myſterious, they could not be underſtood, and therefore they would leave them out of the Cauſe; but it is conceived to be a far better Argument: That therefore the Deed ought to be ſet aſide, conſidering that the Earl, who was no Stranger, but ſo well acquainted therewith, gives ſuch myſterious account of it.*

Notwithſtanding of all this Secrecy owned by the Earl's Anſwer, yet he produced Mr. *Lane* the Duke's Page, who on going to *Jamaica*, had Leave to put his Horſe in *New-hall* Park, but asking the *Duke*, if his Grace ſhould dye, what would become of his Horſe? anſwered, That he had given *New-hall* to the Earl of *Bath*, and he muſt go to him: As alſo, That meeting Mrs. *Crofts* accidentally at *New-hall*, in the Court, and asking, what they ſhould do for want of a good Neighbour? he told her, He had given *New-hall* to the Earl of *Bath*. Now, they would apply theſe Evidences to prove the *Deeds* being publick, which flatly contradicts all the reſt of the Account he gives, That the *Duke* would have this as ſuch a Secret, and yet ſo publiſh it on theſe trivial Occaſions. Nor indeed is it well applicable to the Deed, for the *Dutcheſs* has an Eſtate for Life, by the Deed in *New-hall*, and where then was Mr. *Lane's* Horſe, and Mrs. *Crofts* Neighbour to be? Nay, *Lane* and others of the inferiour Servants ſay, it was the common diſcourſe of the Houſe, That the Earl was to have the Duke's Eſtate: But Mr. *Latton*, another of the *Earl's* Witneſſes, and the Duke's Steward, ſays, That he never heard of any ſuch thing; and for what *Crofts* ſays, That the *Duke* bid the Keys of his Writings be given to the *Earl*: that was only becauſe he was one of the *Duke's* Truſtees. The *Earl* himſelf by his Anſwer makes it a ſecret from Sir *Tho. Stringer*; and ſays, The *Duke* kept it all along, and yet by his Bill ſays, The Deed was given to *Stringer* to make an abſtract of it; but no abſtract ever heard of with the *Duke*: Truth and Juſtice are, and to Eternity allways will be, the ſame. And hence it is, that the *Dutcheſs's* Caſe, by her Bill, Anſwer, and all the Witneſſes is all of a piece, and

Great Inconſiſtences of the Earl's Proof about *Secreſie.*

and hangs all well together: But ſee on the other ſide, how many Contradictions and Inconſiſtences in theſe and many other things there are.

The Third General Head It is well revoked in Equity.

The next General Head is, That if there had been no ſurpriſe in obtaining the Deed, yet in this Caſe it ought to be ſet aſide, as well revoked in Equity; though the power be not litterally purſued.

But before we come to this queſtion in equity, it will not be improper firſt to ſtate the Fact upon the words and meaning of Deed; and then to ſee how far the Common Law and the Civil Law have gone in ſuch Caſes.

The Power is, *That if the* Duke *of* Albemarle *ſhall be minded to make void this preſent Indenture, or any Eſtate therein contained; or to diſpoſe of the ſaid Farms, Mannors, Lands, and Tenements, in any ſort, or to any other Perſon or Perſons, or for any other purpoſe or purpoſes than are in theſe preſents limited: and the ſame his mind ſhall declare and ſignifie under his Hand and Seal, in the preſence of ſix credible Witneſſes; three whereof to be Peers of this Realm: and ſhall tender and pay to the ſaid* Henry Duke *of* New-Caſtle, John Earl *of* Bath, Bernard Greenevil, *Sir* Walter Clargis, *Sir* Tho. Stringer, *or any of them the ſumm of 6d. with intent and purpoſe to make void this preſent Indenture. That then, and immediately after ſuch ſignification, and payment or tender of 6d. the aforeſaid Uſe and Uſes, Eſtate and Eſtates, truſts and confidences ſhall ceaſe, determine, and be utterly void; and that then, and from thenceforth, it ſhall, and may be lawful, to and for the ſaid* Duke, *by ſuch writing, or by any other his Deeds in writing, ſubſcribed as aforeſaid, to declare new or other Uſes or Truſts; or otherwiſe diſpoſe of the Premiſes or any part thereof, at his will and pleaſure, any thing in theſe preſents to the contrary, in any ways notwithſtanding.*

So that now it appears that the *Duke* was not only the firſt owner, but he remained owner of the Eſtate to the day of his Death; and might in the preſence of ſix Witneſſes, and three of them Peers, diſpoſe of it by Deed, or Will, or otherwiſe, as he ſhould think fit: And if there were to this Will ſix ſuch Witneſſes, no Lawyer will doubt but that it were a revocation of the Deed, even at Common Law; though the Deed be not mentioned, or taken notice of in the Will: For if a Man, who has a power of revocation does either by Deed or Will any act inconſiſtent with the ſaid former Deed, that is a revocation thereof: ſo was it reſolved in *Cook's* 10*th Report* 134. *Scoope's* Caſe. *Crook Car. Turton verſ. Snapp. Rolls abridgment* 263. and there the Reaſon is given, *Quia non refert an quis intentionem ſuam declaret verbis an rebus ipſis vel factis*, and there the Caſe of *Fampton*, and *Frampton*, 2 Jac. *is cited.* And the Law is as much ſetled in this, as in any point whatſoever.

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Now then it is to be obſerved how very near this Will comes to be a revocation even within the Letter of the power; and at Law, the power is *not that all the Witneſſes ſhall be ſubſcribers*, *nor that all the Witneſſes muſt be together at a time*, but it is general, *in preſence of ſix Witneſſes*, *and three of them Peers*; ſo that it being once a good Will within the ſtatute by being publiſhed in the preſence of three Witneſſes, if the *Duke* had afterwards publiſhed it in the preſence of three Peers, though at another time; and though they had not ſubſcribed their Names, yet it cannot be denyed but that were a revocation, even within the Letter of the Deed: How here near came the *Duke* to this, he firſt publiſhed it in the preſence of three ſubſcribing Witneſſes, and of Sir *Thomas Stringer*, who did not ſubſcribe his Name, becauſe he was one of the Executors: Then he afterward again in *England* declared it to be his Will at ſeveral other times, in the preſence of Mr. *Bowes*, Lady *Eliz. Peirpoint*, and her Woman, Doctor *Sloane*, Doctor *Barwick*, and Colonel *Monke*; and then in *Jamaica* again, in the preſence of Doctor *Sloane*, Mr. *Fountayne*, and Mr. *Rainey*; ſo then here is the credibility, and more than the number of the Witneſſes, and there only wants Quality for three of them; for if Doctor *Sloane*, *Fountaine*, *Rainey*, Mr. *Bowes*, Doctor *Barwick*, or any three of them had been Peers, it had been a revocation within the Letter of the Power: And here it is to be obſerved, That if Quality for three of the Witneſſes was of ſuch abſolute neceſſity, how hard and unreaſonable an impoſiton was this on the *Duke?* for then he put it upon the matter out of his own power to revoke; for he was in the power of the Peers, whether they would be preſent, or be Witneſſes or no: Nay, it might have been impoſſible for him, ſuddenly to get ſo many Peers even in many places in *England*; and it did ſo happen in fact at *Jamaica*, where this Will was laſt publiſhed: And ſuppoſe that the power had been to revoke in the preſence of ſix *Baronets*, and he had done it in the preſence of ſix Knights; or in the preſence of ſix of the Name of *James*, and he had done it in the preſence of ſix of the Name of *John*; ſurely the ſolemn intention of an Owner of an Eſtate ſhall not be fruſtrated for ſo minute a difference as this.

It was at Common Law, in the time of Ch. Juſtice *Hales* reſolved, and ſo likewiſe in the *Chancery*, by Lord *Nottingham*, in the Caſe of *Dorman* and *Newman*, that where 12 *d.* by the power was to be tendred at *Weſtminſter-Hall*; and inſtead of it was done at *Clarkenwell*; That was held good as well at Law as in Chancery. How far the Caſes at Common Law have gone.

The power was to revoke by *writing under his Hand and Seal, by him to be delivered in preſence of three or more credi-* *Hob.* Rep. 312, 313. *Kibbet v. Lee.*

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ble Witneſſes, and that then and from thencefroth the former uſes ſhould be void. And *Lee* afterwards made a Will in the preſence of four Witneſſes, and Judgment at Law was, That this Will was a good revocation, tho the power was *from thenceforth*, and tho the Will could be no revocation, *till after his Death, for it could not till then be of any effect:* And there it was reſolved that *tho at Law, powers ſhould be purſued, and revocations ſhould obſerve the Circumſtances, yet no more ſhall be impoſed on the Owner, but the Execution of his power ſhall be taken favourably, as agreeable to nature, that every man have power over his own: which is the reaſon the latter Act which does not agree with the former, is conſtrued a revocation, tho according to expreſs words and vulgar ſence it is not: And there is Quoted the Caſe of* Scrope *and* Fitz-Williams, *and a difference is there taken about Conditions, which muſt be ſtrictly purſued, and powers of revocation, which are to be taken Liberally, and the execuntion of them favourably, for the Owner.* So likewiſe *Cook's Inſt.* 237. *A.*

Jones's Rep. 293. *Snap* and *Tarlow.*

And ſo was it in *Jones's* Rep. 293. in that Caſe of *Snap* and *Tarlow*, and the ſame in *Cr. Car.* that where a Man had ſettled an Eſtate to the Earl of *Leiceſter* in Tail, remainder to the Earl of *Warwick* in Tail Male, remainder to the Queen in Fee, with a Clauſe that *if he ſhould Grant, Bargain, or Sell the Lands to any other perſon or uſe, then it ſhould be to thoſe other uſes*: and afterwards the Man made a Leaſe to one, and grants the Fee to another, which was held to be a good execution of the power; and that the Eſtate in remainder was deveſted out of the Queen, without any Office found.

It has been lately reſolved at Law, on the Statutes of Frauds and Perjuries, which requires that a Will muſt be ſubſcribed in the preſence of the Teſtators by three Witneſſes, that tho the three Witneſſes are not altogether at one time, it is good, ſo it be done in the Teſtator's preſence, tho in the preſence of one at one time, and another at another time.

Thus far the Common Law has gone to ſupport mens intentions in the execution of Powers, yet from hence is not now inferred that therefore the Law is on our ſide, for then it will be ſaid, There is no need of Equity; but it is only offered to this purpoſe, That ſince we are ſo near it, even at the ſtricteſt of Common Law, the ſame reaſon ſhould govern to make it without any doubt in Equity; and for the ſame reaſon it may not be amiſs alſo a little to conſider what the Civil Law is in ſuch Caſes, and what has been there done in this Caſe.

The proceedings in the Prerogative in this Caſe, and the Civil Law.

The Dutcheſs and the Executors of the laſt Will brought a Suit in the Prerogative for proof of the Will, and againſt it the Earl of *Bath* ſet up the Will of 1675, and the Deed, and there inſiſted on the Covenant of the Deed, not to revoke the former

former Will, unleſs in preſence of ſix Witneſſes, and three of them Peers to be a *Derogatory Clauſe*: and that this Will not being ſo, muſt be void, and inſiſted alſo there, on its being got by Importunities: And that the Duke intended it not to be his Will, the ſame as in Chancery he did, and the Earl in that Cauſe appealed from the Prerogative, to Judges Delegates, where the Cauſe was heard before ſeveral of the moſt eminent men in *England*, *viz*, Lord Preſident, Earl of *Nottingham*, Earl of *Pembrooke*, Lord Ch. Juſtice *Holt*, Mr. Juſtice *Dolben*, Mr. Juſtice *Rookesby*, Sir *Charles Hedges*, who had been the Earls Councſel, and others Civilians; and Sentence was *nemine contradicente* pronounced for the laſt Will, againſt the Will of 1675, and againſt the Deed.

Now in the Argument of the Caſe, there it was allowed, that by the Civil Law there is ſuch a thing as a *Clauſe Derogatory*, that is to ſay, That a man may make a Will, and declare it that if he makes any other Will which has not the *Lords Prayer*, or is not witneſſed by ſix Franciſcan Fryers, or ſuch like ſuch other Will ſhall be void. Now in that Caſe if the perſon who impoſed ſuch Clauſe upon himſelf make another Will without the *Lords Prayer*, and without ſuch Witneſſes, and that it be doubtful whether he was impoſed upon in ſuch other Will, in it that Caſe will have the effect of a Clauſe derogatory, and the latter Will is void. But in caſe it does fully appear to be *the mind of the Teſtator* and that he was not impoſed upon, then they will follow the mind of the Teſtator, and reject the derogatory Clauſe, tho he either omitted or forgot to mention or purſue the derogatory Clauſe: And there they quoted *Carinus de teſtamentis*, *No.* 59. *Verciculo* 4°. and many other Books, That if it may be preſumed, that from Conjectures or Evidence that the Teſtator did intend the laſt to be his Will, there's no need of mentioning the former Will, or the Clauſe derogatory.

And ſo *Swinburne Paragraph* 14. *N°* 4. holds it as an approved Opinion; for there only regard is whether the Teſtator had *animum teſtandi*, and that is the ſubſtance:

And there they Quoted likewiſe a Clauſe out of *Gulies Heredickes verbo Teſtamentum N°* 24. That at *Venice* an *Italian* Lady importuned her Husband to make a Will, and put a derogatory Clauſe in it, and afterwards he made another without any mention of it, and yet was held to be good.

And *Vineans upon the Inſtitutes*, 7. *N°* 17. reprimands the former antient Writers, for giving ſuch allowances as they had to derogatory Clauſes, as contrary to the Laws of Reaſon and of Nature.

Then it is further to be obſerved, That the Court of Chancery purſuant to the Sentence before of the Delegates, did decree, *That all the Duk's perſonal Eate, ſhall go and be applyed according to the laſt Will* and without all doubt the Dukes intention was the ſame as to the real, as the perſonal Eſtate That they ſhould go together, as he has appointed; and here it may not be amiſs

Court of Chancery have decreed the perſonal Eſtate to go according to the laſt Will and that Decree ſtands.

amiſs to remember another thing in the Earl's Anſwer, where he ſayes, that *tho the Duke gave way to the making this Will at firſt, intending as he ſays it ſhould ſignifie nothing*; yet he ſays, *on the acceſſion of the* 40000 *l. to his perſonal Eſtate from the wreck-adventure he declined to Seal his laſt Will:* which is inconſiſtent with the reſt of his Caſe. It plainly appears from thence, that the Duke did expect and believe the Will was to be effectual, and neither has that ſentence of the Delegates, nor the Decree for the perſonal Eſtate been ever queſtioned, or impeached by the Earl, upon Appeal, or Bill of Review, or otherwiſe. Nay theſe very Judges, and the Lord Keeper who now have taken the laſt Will, not to be the Duke's intention, as to the real Eſtate, have left that Decree to ſtand as to the perſonal Eſtate, tho it is moſt plain, the Dukes intention was that the real and perſonal Eſtate ſhould go together, as aforeſaid.

Objections of one voluntary Conveyance againſt another Anſwered.

Now from the Common and the Civil Law, it is good to be ſeen what the Court of Chancery has done in ſuch Caſes: but before we look upon the Precedents, we will obviate the common objection, That this is, they ſay in caſe of a voluntary Conveiance, and that one voluntary Coveiance againſt the other; it muſt go on the Law ſide, and ſo ſome times it is; but yet there may be great differences, even between voluntary Conveiances, as this laſt Will has very good conſiderations: *Payments of the Dukes Debts, Legacies, Proviſions for his Friends and Relations, better Proviſion for his Wife, erecting of a Tomb, and ſetling of the pious uſes as his Mother intended, eſtabliſhing of his Name and Family, as he intended*: which will be avoided if the laſt Will do not ſtand, and as is conceived are far weightier Conſiderations than any thing offered by the Earl's Deed. But here note the Deed is not only voluntary, but has ſuch a power of revocation, *which is ſo nearly purſued as aforeſaid*, and where the Court will reſolve againſt an Heir at Law, they will alſo againſt a voluntary Conveyance: and it is granted by the other ſide, and ſo did the Court allow, that were this laſt Will to make a proviſion for a Child's Portion, which is alſo voluntary, or were it for any valuable thing, the Chancery would eſtabliſh it againſt the Deed: and it is conceived that ſome of the ſaid conſiderations of the Will are as cogent, and do deſerve as much to be ſupported as if it were for a Childs Portion; but we need not go ſo far: For among ſome of the Caſes, *it will appear that the Chancery, and Houſe of Lords have ſupported Conveyances, purely voluntary, and which were void at Law.*

Precedents in Chancery. *P. & Pelham.*

There is the Caſe of *Pitt* and *Pelham*, in the Houſe of Lords, in *Mich.* Term 1670, upon an Appeal, where the Caſe had been in Chancery thus: *Will. Sherley* in 1650, made a Will, purely voluntary, and after his Wifes Death appointed

Lands

Lands to be ſold, and the Money to be divided in four parts, the one to be diſpoſed of by his Wife, and the other three parts among his three Nephews; and if they dyed, ſome of their parts to one *William Major*. The Wife left the Lands to the Plantiff *Pitt*, and after the Death of ſome of the Nephews, *William Major* ſold his Intereſt to *Pitt*, and ſo did the ſurviving Nephews. *Pelham*, the Heir at Law of *Shirley*, inſiſted, That the Will was voluntary and void at Law, *No perſon being appointed to ſell the Land*; and, That the Eſtate at Law in the Land was deſcended to the Heir, and hopes the Court would not in ſuch caſe compel him to diſinherit himſelf, for the Deviſees could make to *Pitt* no better Title than they had to themſelves: and, That *Pitt* had got the Title from *Major*, pending the Suit: and, That there was more Equity for the Heir at Law, than for the Deviſee. This Caſe was looked upon, as appears by the Orders, *of ſo great weight and precedent*, that the Maſter of the *Rolls*, before whom it was firſt heard, directed it to be made into a Caſe, and to be heard before the Lord Keeper, who had the Aſſiſtance of Juſtice *Wild* and *Twiſden*, and a Tryal was hereupon directed at Law, and on a Special Verdict, it was adjudged at Law, *That the Will was void*; and on the Return of that Verdict and Judgment at Law to the Court, the Lord Keeper, the *4th* of *July* adjudged, That the Will being void at Law, in the very conſtitution thereof, he ſaw no Cauſe to make good the ſame in Equity; and diſmiſſed the Bill, but was ſo tender in the Caſe, that it is mentioned in the Order, That it being a Single Caſe, ſhould not be brought into Precedent in oppoſition to the other Precedents had been brought before him. And an Appeal being afterwards brought in *Michaelmas*, 1670. againſt this Decree or Diſmiſs, the ſame was by the Lords reverſed, and by them it was *Ordered*, *That the Will ſhall ſtand good in Equity, though void at Law*; *and*, *That the Heir at Law ſhall make Conveyance to Confirm the Will*, *and Deviſee's Title thereby*; *and*, *That the Court of* Chancery *do ſee the ſame accordingly done and executed.*

A Leaſe of 40 Years made to a younger Son, to commence after Death of the Father, purſuant to a Power, which power was adjudged void and inſufficient at Law; being in a Deed of Covenants to ſtand ſeized: but the intention of the Leſſor, being that the power and the Leaſe ſhould be good: the Court decreed it accordingly, *and that on any Action at Law*, *the Defendant ſhould not take hold of any inſufficiency of the Power.* 40 *Eliz. Prince and Green.*

By a ſubſequent Order in the ſame Year, that there were three other Leaſes made to *Biſsford* and *Quarles*, which depended on the ſame point, and had the ſame Reſolution, tho' in theſe there was no Child's Proviſion. 15 *Car.* II. Lady *Cranborne* and *Dalmahoy.*

Lady *Cranborne* Plantiff *Tho Dalmahoy* and Dutcheſs of *Hamilton* Defendants, upon a Bill of review of a Decree of 1655, in a Cauſe wherein the ſaid Dutcheſs of *Hamilton* was Plaintiff againſt the ſaid Lady *Cranborne*. One of the Errors aſſigned is, For that the ſaid Decree was contrary to Law and Juſtice: it appearing, That a Deed made by the Earl of *Dirleton*, who was the Plaintiff and Defendants Father, whereon the Decree was grounded, was in nature of a feoffment; but never executed by Livery, and appeared voluntary, and was to diſinherit the Lady *Cranborne*: to which part, the Defendants inſiſted, that the ſame was no Error, For that the Cauſe was adjudged upon the proof of the Earl of *Dirleton*'s intention. The Lord Chancellor, together with Mr. Juſtice *Windham*, were clear of Opinion to diſmiſs the Bill of Review, and confirmed the Decree, though it was all voluntary.

Smith and *Aſhton*. A Power was reſerved to *Ralph Aſhton*, who was Tenant for Life; to charge his Land in *York-ſhire*, by Writing under his Hand and Seal for Portions for younger Children; and he Writ ſome Notes for direction for Counſel to charge the Lands, who drew a draught of a Deed, and left Blanks for Truſtees; but before perfected he dyed: and being firſt tryed at Law on a feigned iſſue, *Whether the ſaid Notes were not part of the Will of* Ralph Aſhton? and found they were. The Lord Chancellor Decreed, *That this was a good Execution of the Power in Equity*, *though the circumſtance of a Seal being put thereto*, 27 *Car.* II. *Smith. Aſhton.*

was

was wanting; and that the ſaid Notes were a clear Declaration of his intentions: And this, though it was inſiſted on the other ſide, not only that the Power was not literally purſued, and the Notes only voluntary, but alſo that the Defendant came in on a Marriage-agreement, and had no notice of the ſaid Notes.

1 *W. & Mar.* *Thwaits v Dye.* *Martha Thwaits* Plaintiff, *John Dye*, and *Frances* his Wife, another of the Daughters of *Will. Thwaites* deceas'd, and others Defendants; *Will. Thwaites* the Father of the Plaintiff and Defendant, and having alſo a Son and other Children, conveyed his Lands to the uſe of himſelf and Wife, for life: and after their deaths, to the uſe of ſuch Child or Children: and for ſuch Eſtate, and Eſtates as the ſaid *William by any writing under his Hand and Seal, duly executed before two credible Witneſſes* ſhould limit or appoint, and for want of ſuch appointment to *Thomas* his ſecond Son, the Defendant *Frances* his eldeſt Daughter and their Heirs, with like Power alſo of revocation; and *William* and his Wife dyed, and *Thomas* being alſo dead, Defendants *Dye* and his Wife became ſeized, *Will. Thwaits* after the ſaid Deed, but taking no notice thereof by a Paper in form of a Will, *but having no Seal*, but only two Witneſſes, charged the Lands with a 100 *l. per annum*, annuity to his Son *Thomas*, and the Heirs of his Body, with remainder thereof to his Son *James* and the Heirs of his Body, and that 500 *l.* ſhould be paid to the Plaintiff for her Portion. This upon a Caſe ſtated, *and on great debate was decreed, That* William Thwait *had well executed the Power; and that he being Owner of the Land, and having Power to limit any other Eſtate or Uſe, might limit a Rent out of the ſame, and might charge the Rent with any Sum of Money for Childrens Portions; and that the ſaid Will was a good Appointment, in writing within the ſaid Power, though not a good Will in Law, there being but two Witneſſes, yet the ſame is a Writing under Hand. And their Lordſhips alſo declared, That though the ſaid Writing had been only under Hand, and not ſealed, as the Power was, yet it is a good Appointment in Equity, purſuant to the Power, and eſpecially in this Court, ſhall be ſo taken, and allowed, and declared, that it had been ſo adjudged in the like Caſes, and decreed the Plaintiff the* 500 l. *which, upon an Appeal in the Houſe of Lords, hath been ſince affirmed by their Lordſhips.* If it be pretended, as it hath, That this of *Thwaites* and *Dye*, was to ſupport a proviſion for Children. *Anſw.* That the Remainder by the Deed, for want of ſuch Appointment, is to his Son *Thomas* and Daughter *Frances*, and their Heirs. So that as this Appointment was to give to *Thomas* and Plaintiff *Martha*, it was to take from Defendants *Frances* and *Thomas*, and are all Children in *æquali gradu*, in that reſpect.

Popham and *Bamfiela*'s Caſe, That a Proviſo of a Settlement was not literally purſued at Law; and for that reaſon the Eſtate veſted in another in Remainder: But becauſe in effect and ſubſtance the Proviſo was purſued, therefore decreed to be well in Equity. Which Decree has been ſince affirmed by the Lords.

1 *Car.* II. They have for the Earl of *Bath* inſiſted on the Caſe of *Ward* and *Lee*, but the Caſe is plainly againſt them. The Caſe was a on a Decree made by Sir *Thomas Bruerton*, with Power of Revocation on Tender of 6 *d.* and by Deed in Writing to revoke: And he being in Paſſion with his Wife, who had ſome ſmall Part of the Eſtate for her life by the Deed, in Heat and Anger cancelled the Deed, and the Heireſs at Law would have that a Revocation, and Defeat Mr. *Boothe*, to whom a great Part of the Eſtate is limited by the Deed: *Whereupon the Lord Chancellor declared, That though where there appears a real intention to revoke, and that by accident there happens a Diſability, or a clear Proof that the Party is by Fraud prevented to execute ſuch Act as will amount to a Revocation, this Court may relieve, though there be no formal Revocation. But on reading the Proofs in this Cauſe, there not appearing any Intention, or any Fraud or Impediment to execute ſuch Power: But on the contrary, that he had the ſaid Deeds in his Hands ſeveral times, and what he did in order to the deſtruction of the ſaid Deeds, he immediately repented him of, and gave the ſaid Deed back to one of the Truſtees, to be kept for the Benefit of the Perſons and Eſtates therein limited and concerned; and often*

enquired

enquired, Whether notwithſtanding ſuch his raſh act, the Deed continued ſtill in force, and being adviſed it was ſtill a good Deed, and in force, he declared great ſatisfaction therewith. And *therefore the Court would not relieve, but diſmiſſed the Plaintiffs, the Heirs at Law, becauſe that was the intention of Sir* Thomas Bruerton.

There is alſo the Caſe of *Garland* and *Bowdler*, 300 *l.* was deviſed to a Daughter, provided ſhe get the Executors Conſent to her Marriage in Writing; and it was decreed, That a verbal Conſent was good, for the ſubſtance was thereby performed. 10 *Car.* I.

Livery and *Seiſin*, for want whereof, the Conveyance being a Feoffment, was void at Law, yet decreed good in Equity; tho the Order ſays it was a voluntary Feoffment. 18 *Jacobi.*

Paget and *Paget*. There was a Deed of Revocation, add declaring other uſes, but therein were left ſeveral Blanks, which were not filled up till after the Parties death, yet held good in Equity. 1687.

It was lately decreed in the Caſe of *Jemy* and *Barker*, that when there wanted a Surrender to the uſe of a Will, by reaſon whereof, the Eſtate being Copyhold, was void at Law, yet decreed good in Equity: And though the Deviſe was only to a younger Siſter, againſt an elder Siſter, and that the younger Siſter was otherwiſe better provided for than the elder Siſter. *Jemy's* Caſe.

The Caſes likewiſe of *Pomham* and *Bamfeild*, and of Sir *Charles Chymſh*, ſhow how far the Court will go to purſue the Intention of the owner, when plainly appearing.

But now to look a little back on the preſent Caſe, it is further to be demonſtrated, That not only the Duke, but alſo the Earl himſelf, and all the reſt of the Duke's Truſtees, who knew of this Will, did thereupon look upon the laſt Will to be the Settlement of the Duke's Eſtate, and that the Deed muſt be concealed from the Duke, and forgot by him, and not regarded by the Earl, or any of the Truſtees; appears by the ſeveral Letters between them and the Duke, whereby the Earl of *Bath* hath under his own Hand given Judgment againſt himſelf, as to the Duke's Intention. Not only the Duke, but alſo the Earl, and all the Duke's Truſtees, looked on this laſt Will, as the Settlement of the Duke's Eſtate.

Firſt Dr. *Barwick*, and others ſwear, That on the News of the death of Colonel *Monke* in *Holland*, the Appellant *Chriſtopher* was by him, and the reſt of the Truſtees looked upon as the Duke's Heir, and Sir *Walter Clargis* writ a Letter, all of his own Hand, dated 11th. *Feb.* 168⅞. to the Duke, wherein he expreſſes himſelf thus; That he is deſired by the Friends of Colonel *Monke*, to acquaint his Grace with his Death, and how he had left his Wife and Children in low Circumſtances; and therefore moves his Grace for orders for ſome ſpeedy Subſiſtence for them, and for the Education of the Children; and therein alſo goes on in theſe words, *viz. I hope you will by the firſt conveniency be pleaſed to ſend us over ſome Orders in it; for I muſt needs confeſs, as to my own particular, that I think it very proper, ſince your Grace has thought fit to promote that Branch of your Family (how remote ſoever) into ſo great a ſhare of your Favour, there ſhould be ſomething done towards the breeding up of the Children, to make them appear in the World anſwerable to that Figure which your Grace has deſigned they ſhould one Day make in it.* To this Letter there is a Poſtſcript ſigned by the Earl of *Bath*, and other Truſtees, in theſe words; *My Lord, we have received a Letter to the ſame purpoſe with that to Sir* Walter Clargis, *and joyn with him in the ſame requeſt. Signed*, Bath, Craven, William Cheney, Thomas Stringer. Several Letters from the Duke and the Earl, *&c.* about Mr. *Monk*

A Let-

27 *April*, 1688. A Letter from Sir *Walter Clargis*, to Mr. *Bowes*, the Duke's Gentleman of the Horſe in *Jamaica*; wherein he expreſſeth himſelf thus, *viz. I ſent his Grace word long ago, that poor Colonel* Monke *was dead, and that he had left his Wife and Children in very great neceſſity*; and *that it was my Judgment, ſince his Grace thought fit to give them ſo great a proſpect hereafter, he ſhould allow them ſomething in preſent, that they may be bred up equal to ſuch Character*; *therefore, if you find an opportunity, incline him to it.*

16 *Jan.* 1688. A Letter from the *Earl of* Bath, *Earl of* Craven, *Sir* Tho. Stringer, *and Dr.* Barwick, *to Mrs.* Monk, *to let her know they had acquainted his Grace with her Husband's Death, and with her Condition, who had been pleaſed, in continuance of his Kindneſs, to give Directions for the Education of her eldeſt Son, at Monſieur* Fawbert's, *the moſt eminent Academy here, where he ſhall be taken ſuch care of, as ſhall anſwer his Grace's Expectations, and deſires her to ſend him over with the firſt conveniency, that he may loſe no time.*

10 *Sept.* 1688. From Sir *Walter Clargis*, to the Duke, wherein he acquaints him, That Col. *Monke*'s Son is come over, and ſeems to be a pretty young Gentleman; and, That he was not yet at Mr. *Fawbert* s Academy, but that they intended to put him there as ſoon as Conveniencies could be bought for him, like the reſt of the Academiſts.

14 *April*, 1689. *A Letter from the Duke in* Jamaica, *to* Tho. Stringer, *taking notice, That he had heard of the Death of his Kinſman Col.* Tho. Monke, *and deſired him to acquaint the reſt of his Truſtees, That it was his deſire, that care be forthwith taken of his eldeſt Son, to be well educated, that he may receive ſuch Improvement as is proper for what I have already deſigned him; and therefore I think it convenient that he be put under the tuition of Monſieur* Fawbert, *and that particular Care be taken to ſee it done, and give me an account, from time to time, how he proceeds in his Studies.*

——And Mr. *Fawbert* alſo ſwears, That the Duke wrote a particular Letter to him, to take Care of him. Now, ſurely a man of the Duke's Honour and Sincerity was not in jeſt when he did all this; not only not to intend his Couſin *Monke* ſhould not have his Eſtate when he told him he ſhould, but to put him upon a way of Education very improper for him, if he were not to have the Eſtate, and abſolutely to Ruin him with Suits after his Death, and to draw his own Name and Honour ſo much in queſtion, with the King and every body, after his Death, when he had no manner of Occaſion or Temptation upon him ſo to do.

Note, that Mr. *Monke* had no Proviſion nor Proſpect from the Duke any other way than by the Laſt Will: And farther alſo, That the Duke, upon the News of Col. *Monke*'s Death, put himſelf and Family into Mourning for him: And further alſo, According to the Duke's Directions, he was put out by the Earl and Truſtees, to *Fawbert*'s; and the chief Care of placing him was left to the Earl, who agreed for him and a Servant to be there, at the Duke's Expence, at 34 *l.* a Quarter, beſides Clothes and other Neceſſaries, which came to above 200 *l. per annum*, and the Earl and Truſtees uſed often to viſit him there. All which is fully proved.

The Earl's Anſwer about the Duke's directing *Monke* to be bred at *Fawbert*'s.

Now, the Earl, by his Anſwer, goes to explain all this, and ſays, *That* Fawbert's *was the place where the Duke uſed to breed his Pages, and has proved that* by a Witneſs; but we would have his Lordſhip ſhew how many ſuch Expreſſions as are in the ſaid Letters, either the Duke or he ever had of any of his Pages, what Figures they were to make, and Characters they were to bear, one day in the World; and what the Duke deſigned for them; or how many Pages did the Duke breed with a Servant, at 200 *l. per annum*; and how many Viſits did the Earl, and the Duke's Truſtees ever make to any of the Pages, as is proved they did to him?

The

The 4th and laſt General Head, is, *That tho this Deed had been duly obtained, and had not been concealed, and had no power of Revocation, yet it ought to be taken, in Equity, as a Truſt for the Duke himſelf, and ſtill alterable, and in his Power to diſpoſe.* 4th Laſt general Head. Truſt.

It is plain, *This Deed* is not a *Subſtantive of it ſelf*, but intirely depends, and pins it ſelf on the *Will* of 1675. which it rec tes and ſays, *It is to corroborate* and *confirm*, and not to *revoke it*: And it ſays, *It is to ſecure all the Legacies of that Will*; And yet the Will of 1675, was not only revoked by the *Deed*, by limiting the Eſtates to different Uſes than the *Will did*; for which Reaſon, no Man can tell what *Rational Conſtruction* to make of the *Deed* and *Will* of 1675, to make them ſtand together, but alſo the *Will* of 1675, as to all the *Legacies*, is now revoked by the *Will* of 1687. There's noth ng then ſeems more Natural than to conſtrue it, That *this Deed* being purely voluntary, and it appearing by it, that the Duke had ſo much before him, the corroborating of *his Will*, which was *Ambulatoria uſque ad Mortem*, that this *Deed* ſhould be *quaſi a Will*, and that this laſt *Will* being ſo ſolemnly *his Intention*, ſhould declare the Truſts of the Deed. The Judges at Law have gone pretty near ſuch a conſtruction as this, even where there was no power of Revocation. *Dyer* 314. A Man by Deed indented, in 13 *H.* 8. declared, *That whereas he had ſuffered a Recovery, to the intent to perform his Will, touching the diſpoſition of his Lands*, In the firſt place declares, *That the Feoffees ſhall ſuffer him to receive the profits for his Life; and after his Deceaſe, that they ſhall ſtand ſeized of a Third part, to the uſe of his Wife for Life, and then to his Son* R. *with other remainders over.* This Deed had no Power of *Revocation*, and the Queſtion was, *Whether he could alter or change it, or the Will he had mentioned in it*; And it was reſolved by Dyer, and the reſt of the *Judges*, *That he might well change the former Will, for that a Will, and the Laſt Will, are the ſame; and the Recovery was to perform his Laſt Will; and that this* Deed or *Indenture ſhall be taken* quaſi *a Will, which is always changeable.* *Dyer* 314.

Huſſey purchaſed a Mannor of the Queen, and made his Will, and afterwards made a Feoffment, to the uſe of ſuch Perſons, and for ſuch Eſtates as he had declared by *his Laſt Will*, of ſuch date; and *adjudged, that the Feoffment was a Revocation of the Will, but that the Revoked Will was ſufficient to declare the Uſes of the Feoffment.* *More* 789. *Huſſey's* Caſe.

Earl of *Ormond*, Father to the Lady *Dingwall*, ſuffered a Recovery to the Uſe of *his Laſt Will*, and afterwards by *Writing under his Hand and Seal*, did declare, *That the Recoverers, and their Heirs, ſhould ſtand ſeized to the Uſe of himſelf, in Taile Male remainder to the Lady* Dingwall, *his daughter, and the Heirs of her Body remainder to the Right Heirs of the Earl. Here was no power of Revocation*; and the *Queſtion* was, *Whether thoſe Uſes were revocable? For if they be, then the Earl hath made a Will, and a Revocation, de facto, by limiting other Uſes; and one Judge thought they were not; but Two of the Judges, were of Opinion, they were revocable at all times, becauſe all was grounded on the Recovery, which was to the Uſe of his Will, which was always changeable; And* 2dly, *For that the Recovery was to the Uſe of his Laſt Will, which is not underſtood a Teſtament only, but any other voluntary diſpoſition; And the Uſes limited to the Lady do not contradict the firſt Limitation, but rather ſtand as an Expreſſion, how his Mind ſhould be for the Time; and yet nevertheleſs is ſtill ſubject to the change and Alteration of his Will, which was taken to be agreeable with the former Reſolution in the Books, and with all the ſubſequent Acts of the Earl.* *H b.* 348. Earl of *Ormond's* Caſe.

Now then what can be nearer the Reaſons of theſe Reſolutions, than to conſtruct that this *Deed* ſhould be *Quaſi* a *Will*, and ſtill in the Dukes Power, and that this *laſt Will* ſhould direct the Uſes of it, the rather alſo for that there is a Truſt appears for the Duke upon the very Face of the Deed, Truſt appears on the face of the Deed.

where it is thus expreſſed. *And it is declared by theſe Preſents, That all the Honours, Manners, Lands and Premiſes, by theſe preſents, or by his ſaid laſt Will, ſetled upon the ſaid Earl of* Bath, *and his Heirs, are ſo ſetled upon this ſpecial Truſt and Confidence in him repoſed, that he the ſaid Earl of* Bath, *and his Heirs (if there ſhall be need thereof) ſhall ſell ſo much Lands, part of the Lands ſettled to him and his Heirs as aforeſaid, as ſhall fully and honeſtly pay the ſaid Duke's juſt Debts and* Legacies, *and Funeral Charges, within a convenient time after his deceaſe, as much as the Perſonal Eſtate comes ſhort in the Payment thereof by the Executors of the ſaid Duke in his Will mentioned.* Now if in *this Declaration*, that only theſe words *in his ſaid Will mentioned*, were omitted, then it were a general truſt; and though the Eſtate at Law were Veſted *in* the Earl by the Deed, yet he would remain a Truſtee to pay all the Duke's Debts, and whatſoever Legacies, or what Eſtates he ſhould *give* by any *Will*, which would be a good appointment of the Truſt without ſix ſuch Witneſſes, and then the *laſt Will* would have its full Operation upon it; but the other ſide would avoid this, by ſaying that theſe words (*all the Debts and Legacies of the ſaid Duke, by the Executors of the ſaid Duke, in his ſaid Will mentioned*) ſhall reſtrain it, that he was never to Pay any more than the Legacies in that Will of 1675. and if that Conſtruction ſhould hold, then ſee what will happen, *The Earl hath the Duke's Eſtate on Truſt to pay his Debts and Legacies; but now he refuſes to pay the Legacies of the laſt Will, becauſe they are not in the firſt Will; and he likewiſe refuſes to pay the Legacies of the firſt Will, becauſe it ſtands now revoked by the laſt Will ſo he would now carry away the Eſtate diſcharged of all the Legacies, which is expreſsly contrary to the Truſt and expreſs words of the Deed, which ſay, it was to ſecure the Legacies*; And when that Will of 1675. (to which the Deed was only Ancillary, and Builds it ſelf upon that Foundation) is now fallen, it ſhould ſeem the Superſtructure of the Deed ſhould alſo fall with it. And further alſo obſerve, the Duke might have charged Debts to the full value of the whole Eſtate.

It is not here to be forgot, that ſince they take thoſe five words (*in his ſaid Will mentioned*) to be ſo very reſtrictive and material, it were to be wiſhed they would give a better account what were the words which at firſt followed thoſe words in the draught of the Deed produced by them, as the ſupport of the Deed; for it was the laſt day of Hearing, and never till then diſcovered; that after thoſe words which are towards the bottom of the ſheet, there are two Lines of that ſheet cut clear away, and the tops of ſome of the Letters of the next line ſtill remaining, which ſhews there was more Writing there, and if theſe words cut away, had been (*in the ſaid Will, or in any other Will, or writing mentioned*) no doubt then it had been a general Truſt, and the Duke might have appointed it as he pleaſed; and now this being all along in their Cuſtody, and Cut in ſo material a place, it ought to be preſumed againſt them, and what we ſay or ſuggeſt it was, unleſs they give a very good Account what it was, and how it came to be Cut.

But there ſeems ſtill the leſs Reaſon to ſtand upon *Niceties*, and ſo much *ſtrictneſs in the Conſtruction of this Title*, when that there is no *Conſideration* ariſing from the Earl, in compariſon with thoſe *in the Laſt Will*; and when that tho *this Deed* ſhall be ſet aſide for one thing or other, or taken as a Truſt, that then by eſtabliſhing of the Laſt *Will*, all the Chief Ends and Intents of the Deed are performed in theſe Reſpects, *All the Debts and Legacies will be paid, The deſcent to the Heir of the Regicide will be prevented, no Counterfeit or Surreptitious Will can be ſet up*, and the Duke's Eſtate will be Honourably ſetled, not only in his Blood & Family, but in his Name, to which the Deed ſeems to have ſo great regard; but by the contrary conſtruction the Dukes whole deſign and intent ſo ſolemnly and deliberately ſignified, by his laſt Will, will be intirely avoided.

The

The Earl ſtands much on his great Services to both the Dukes, which 'tis believed was more than repaid by them, with a return of Services; beſides, that his kindneſs was not forgot, when by his laſt Will he left his Son *Bevile Greenvill* an Eſtate worth 30000 *l.* to him and the Heir Males of his Body; and though the old Duke might move the King, as he ſays, for a Privy Seal to make him Duke of *Albemarle*, and to give him the reverſion of *Theobalds* if he died without Iſſue; yet theſe were things belonging intirely to the King, and it ſignified nothing to the Duke; but when he came to diſpoſe of his own Eſtate he both made a Will, by which he named Nine Guardians of his Son, and did not ſo much as give him the trouble of that Truſt, nor name him, nor is the Earl ſo much as named in the Marriage-Settlement, perfected a few days before the Duke's death, though others of the Duke's Friends are: And neither was Duke *Chriſtopher*'s Reſolution conſtantly ſettled towards him, as has been pretended; for he made a Will in 1673, and deviſed the Bulk of his Eſtate between Sir *Thomas Clargis*, and Mrs. *Rawlinſon*, and Mrs. *Farewell*, and did not ſo much as name the Earl of *Bath* in it, ſave only in Remainder after an Eſtate Tail in a ſmall part to *Bevile Greenvill*.

Anſwer to the Earl's Services, and to the Privy Seal.

Then the Earl ſeeks to diſparage Colonel *Monke*, as one who had been low at firſt, and not of the Duke's Relations. But it is ſufficiently proved, That he was a Gentleman of good value and eſteem, and was always in great regard with the Duke; and many kind Letters appear, whereby he always owned him as his Relation and Friend.

Duke's Kindneſs and Relation to Colonel *Monk*.

One Objection they have made againſt the laſt Will, That the Duke muſt have been ſurprized in it, becauſe he has deviſed *Potheridge* to Colonel *Monke*, and deſired he ſhould live there: Whereas the Duke was only of that part Tenant in Tail, with Remainder to Mrs. *Pride*, and ſo it could not paſs by the Will.

Objection about *Potheridge* anſwer'd.

To this the Anſwer is plain, That the Duke being Tenant in Tail, might have ſuffered a Recovery, and diſpoſe it where and how he pleaſed: But that he knew there wanted ſuch Recovery, appears in this, That he *deviſed to Mr.* Pride 5000 l. *which was near the value, upon condition that he and his Mother releaſe their Pretences thereto. And*, Secondly, *by this, That juſt about the time of the laſt Will, there is an Agreement under Hand and Seal, between the Duke and Mr.* Pride, *whereby in conſideration of* 300 l. *in hand, paid by the Duke, he Covenants to lay out what the Duke ſhould leave him by his Will to the uſe of himſelf for life, and then to his Iſſue*, &c. *And, alſo in conſideration thereof, Covenants to convey* Potheridge *to ſuch Perſons and Uſes as the Duke ſhould direct by his Will.* And to this Deed the Earl of *Bath* is a ſubſcribing Witneſs, though he hath ſince bought *Pride*'s Title to it.

But, notwithſtanding all this that was inſiſted upon, the Count have diſmiſſed the Dutcheſs, and Mr. *Monk*'s Bills, *(which were to eſtabliſh the Laſt Will of the Duke, and to have his Real as well as his Perſonal Eſtate go accordingly)* ſo far as they ſeek Relief, as to the Real Eſtate againſt the ſaid Deed. And though long Speeches were made in Court, on their giving Judgment, yet the Court have not thought fit, in the Decree of Diſmiſs, to inſert any one Reaſon for their ſo doing, but in general only, That they ſee no Cauſe of Relief. But, it is humbly prayed, *that the ſaid Decree may be Reverſed by the Lords, and the Laſt Will eſtabliſhed, for the ſeveral and many Reaſons aforeſaid.*